Supreme Court, U.S.
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No. 02-770

In The
Supreme Court of the United States

NICHOLAS DESTEFANO,

Petitioner,

v.

BROADWING COMMUNICATIONS, INC.;
BROADWING TELECOMMUNICATIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

NANCY L. PATTERSON
Counsel of Record
ANTON PAL MONTAÑO
BAKER & HOSTETLER LLP
1000 Louisiana, Suite 2000
Houston, Texas 77002-5009
(713) 751-1600 –Telephone
(713) 751-1717 –Telecopier

Counsel for Respondents
Broadwing Communications, Inc.;
Broadwing Telecommunications, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a district court must compel arbitration of a plaintiff's Title VII claim, which is encompassed by the language of an arbitration provision in an employment agreement, even though the parties to the employment agreement agreed to waive punitive damages as a remedy in all of their disputes arising out of the employment agreement.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were (a) plaintiff-appellant Nicholas DeStefano; (b) counsel for plaintiff-appellant Michael Jay Juper and Larry D. Knippa; (c) defendants-appellees Broadwing Communications Inc. and Broadwing Telecommunications Inc.; and (d) counsel for defendants-appellees Nancy L. Patterson and Anton Pal Montaño.

CORPORATE DISCLOSURE STATEMENT

Broadwing Telecommunications Inc. (Respondent) is a subsidiary of Broadwing Communications Services Inc., which is a subsidiary of Broadwing Communications Inc. (Respondent). Broadwing Inc. is a publicly-held company and is the parent corporation of Broadwing Communications Inc. There is no parent or publicly-held company owning ten percent or more of Broadwing Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF INTERESTED PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
COUNTER-STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT	6
II. THE DECISION BELOW DOES NOT PRESENT A CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *PALADINO V. AVNET COMPUTER TECHNOLOGIES, INC.*	9
III. A WRIT OF CERTIORARI IS NOT WARRANTED MERELY BECAUSE THIS CASE INVOLVES THE ARBITRATION OF EMPLOYMENT DISPUTES	12
IV. A WRIT OF CERTIORARI IS NOT WARRANTED BASED UPON THIS COURT'S DECISION TO REVIEW *PACIFICARE HEALTH SYSTEMS, INC. V. BOOK*	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 12, 13, 14, 15

Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991) 6, 7

Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3rd Cir. 1997), *cert. denied*, 522 U.S. 915 (1997) 9

Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) 7

Herrington v. Union Planters Bank, N.A., 113 F.Supp.2d 1026 (S.D.Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) 9

Howsam v. Dean Witter Reynolds, Inc., ___ U.S. __, __ S.Ct. __, 2002 WL 31746742 (Dec. 10, 2002) (No. 01-800) 7, 8

Kinnebrew v. Gulf Ins. Co., 1994 WL 803508 (N.D.Tex. 1994) 9

Larry's United Super, Inc. v. Werries, 253 F.3d 1083 (8th Cir. 2001) 9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 6, 7

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983) 8

Pacificare Health Systems, Inc. v. Book, 285 F.3d 971 (11th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3264 (2002) (No. 02-215) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998) 9, 10, 11

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 8

FEDERAL STATUTES AND REGULATIONS

9 U.S.C. § 1 *et seq.* 12

9 U.S.C. § 2 1

9 U.S.C. § 4 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1981(a) 1

42 U.S.C. § 2000e *et seq.* 1

42 U.S.C. § 2000e-3 ..... 2, 4

OPINIONS BELOW

Both the opinion of the United States Court of Appeals for the Fifth Circuit and the opinion of the United States District Court for the Southern District of Texas are unpublished. The opinions are attached in the appendix of Petitioner's Petition for Writ of Certiorari ("Petition").

COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction over the Petition under 28 U.S.C. § 1254(1) because the Petition asks the Court to issue a writ of certiorari to review a case decided by the United States Court of Appeals for the Fifth Circuit. The jurisdiction of the federal courts was originally invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331 (federal question jurisdiction). However, Petitioner has misrepresented the proceedings in the Fifth Circuit court. Petitioner actually failed to file any "petition for rehearing" in this case. Therefore, contrary to what Petitioner stated in the "Statement of Jurisdiction" in his Petition for Writ of Certiorari, the Fifth Circuit appellate court did not deny any "petition for rehearing" in the instant case. (*See* Pet. for Writ of Cert. ("Pet.") at 1).

STATUTORY PROVISIONS INVOLVED

This case involves §§ 2 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and 42 U.S.C. § 1981(a). The text of these statutory provisions is set forth in the appendix to this brief.

COUNTER-STATEMENT OF THE CASE

This case is an appeal of the Fifth Circuit court's opinion affirming the district court's order compelling the arbitration of Petitioner Nicholas DeStefano's and Respondents Broadwing Communications, Inc.'s and Broadwing Telecommunications, Inc.'s (collectively, "Broadwing") claims against each other. Among other claims, DeStefano alleged a Title VII retaliation claim against Broadwing which he now argues should not be subject to arbitration. 42 U.S.C. § 2000e-3.

The facts pertinent to this matter began in the Fall of 1998 when acquisition discussions began between Austin-based IXC Communications, its subsidiary Eclipse Telecommunications, Inc. (collectively "Eclipse"), and Houston-based Coastal Telephone Company ("Coastal"). (R 146-148).[1] DeStefano served as Coastal's Sales Manager and was, in effect, the "number two man" at Coastal. By all accounts, it was DeStefano's unique style and energy which had led to Coastal's significant financial performance. (R 147). DeStefano managed the sizeable telemarketing force which was the heart of Coastal's business. Naturally, therefore, DeStefano, as a key representative of Coastal, was involved in the due diligence acquisition discussions with representatives of Eclipse. (R 148). Broadwing contends that during these initial discussions, DeStefano made material and fraudulent misrepresentations and/or material omissions of fact about Coastal's

[1] "R" indicates a reference to the Record on Appeal. "RX" indicates a reference to Appellees' Record Excerpts set forth in the appellate court. Although the Record is not before this Court, these citations are provided out of courtesy to the Court.

workforce, sales operations and sales environment among other things, which contributed materially to the ultimate decision by Eclipse to purchase Coastal. (R 52-55, 148).

On January 8, 1999, DeStefano executed an Employment Agreement with Eclipse Telecommunications, Inc. which included an arbitration provision. (R 37, RX: I). The Employment Agreement provided that DeStefano would become an employee of Eclipse upon the closing of the Purchase Agreement and continue his duties in running the sales force in the Houston Office. The sales transaction closed on May 10, 1999, whereupon DeStefano became an Eclipse employee pursuant to the terms of the Employment Agreement. (R 148).

The arbitration provision contained in Paragraph 5.12 of the Employment Agreement states as follows:

> 5.12 *Binding Arbitration.* The parties hereby consent to the resolution by binding arbitration of all claims or controversies in any way arising out of, relating to or associated with this Agreement. Any arbitration required by this Agreement shall be conducted before a single arbitrator in Austin, Texas in accordance with the commercial arbitration rules of the American Arbitration Association then existing, and any award, order or judgment pursuant to such arbitration may be enforced in any court of competent jurisdiction. The arbitrator shall apply rules of Texas law and the parties expressly waive any claim or right to an award of punitive damages. All such arbitration proceedings shall be conducted on a confidential basis. Notwithstanding the foregoing, either party may seek injunctive or other equitable relief in a court of law without proceeding through arbitration.

In the Fall of 1999, only a few short months after the sale, twenty-seven (27) individual Charges of Discrimination were filed with the Equal Employment Opportunity Commission ("EEOC") by employees in the Houston Office of Coastal, now Eclipse. Many of these charges listed DeStefano as the primary instigator of a highly sexually-charged hostile work environment. Several charges also alleged that DeStefano and others had engaged in overt racial discrimination and racial harassment. (R 146). The Company immediately began an internal investigation of these charges. (R 146).

DeStefano's employment was terminated on November 4, 1999, pursuant to Section 4.3 of the Employment Agreement. (R 46). The EEOC conducted its own administrative investigation of the various discrimination charges from late October 1999 through March 2000. That investigation confirmed significant improper conduct by DeStefano. In May 2000, Broadwing, having acquired IXC and Eclipse, participated in a mediation with the various charging parties and the EEOC which resulted in a global settlement of the underlying discrimination charges. (R 145-146).

On June 27, 2000, DeStefano filed a lawsuit in State Court in Harris County, Texas against Broadwing for breach of the January 1999 Employment Contract; retaliatory discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3; and tortious interference with contract. (R 19). Under federal question jurisdiction, Broadwing removed the case to the United States District Court on August 2, 2000. (R 23). On August 15, 2000, Broadwing filed its Motion to Compel Arbitration along with its Answer with Counterclaims against DeStefano. (R 49, 64). Broadwing's counterclaims dealt with allegations

of fraud, breach of fiduciary duty, gross negligence, and negligence by DeStefano based on his participation in the acquisition discussions which led to the purchase of Coastal by IXC. (R 64). In addition, Broadwing asserted a breach of contract claim based on DeStefano's Employment Agreement. In filing its Petition to Compel Arbitration, Broadwing sought to have all claims between DeStefano and Broadwing subjected to arbitration because it is Broadwing's opinion that all claims from both parties are subject to the arbitration provision found in the Employment Agreement. (R 49). On September 5, 2000, DeStefano filed his Opposition to Broadwing's Motion to Compel Arbitration. (R 82). On October 31, 2000, the District Court entered an Order directing arbitration of all issues between the parties and dismissed the lawsuit. (R 92, 93).

On February 26, 2001, DeStefano filed his Notice of Appeal challenging the Order compelling arbitration. (R 162). On August 20, 2002, after briefs had been filed and oral argument had concluded, the United States Court of Appeals for the Fifth Circuit filed its opinion affirming the trial court's Order compelling arbitration, and entered its judgment in the case. The Fifth Circuit correctly determined that DeStefano through the arbitration agreement had waived any claim to an award of punitive damages. (*See* Pet. at A-10-11). Moreover, although Title VII allows the recovery of punitive damages, the appellate court held that the waiver of punitive damages did not prevent the arbitration of DeStefano's Title VII claim because (1) punitive damages did not represent a "right" to assert a cause of action, but were merely "a remedy that Title VII makes available in certain instances"; and (2) it was for the arbitrator in the first instance to "consider the argument

that the remedy of punitive damages may not be effectively waived for a Title VII claim." (*See* Pet. at A-11). Noting that the arbitrator's decision was always subject to judicial review, the court reasoned that it "may not even be necessary to reach this issue [of punitive damages] if it is determined that DeStefano's Title VII claim is without merit (or, even if meritorious, is not such as would support punitive damages under Title VII)." (Pet. at A-12).

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The crux of Petitioner's argument is that his Title VII claim against Broadwing would be appropriate for arbitration *but for* the Petitioner's waiver of punitive damages in his arbitration agreement. Based upon that assumption, Petitioner mistakenly argues that the Fifth Circuit opinion allowing Petitioner's Title VII claim to be arbitrated conflicts with opinions of this Court, such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), because the parties to the arbitration agreement expressly waived punitive damages as a remedy for the arbitrated claims. (Pet. at 3). Petitioner specifically cites to language in *Gilmer* and *Mitsubishi Motors* that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

However, this language does not conflict with the Fifth Circuit's opinion.

Neither *Mitsubishi Motors*, nor *Gilmer*, expressly prevents the arbitration of a plaintiff's Title VII claims where the plaintiff has waived any claim of punitive damages in the arbitration forum. To the contrary, the Fifth Circuit's opinion proceeds according to the Supreme Court's arbitration precedent. Indeed, where the language in the arbitration clause encompasses certain statutory claims, *Gilmer* and *Mitsubishi Motors* set forth that parties to the arbitration clause must live by the language unless Congress says otherwise:

> Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."

Gilmer, 500 U.S. at 26. Accordingly, the Fifth Circuit correctly considered the arbitrability of Petitioner's Title VII claim under this settled standard.[2] (*See* Pet. at A-11).

Moreover, this Court's recent decision in *Howsam v. Dean Witter Reynolds, Inc.*, __ U.S. __, __ S.Ct. __, 2002 WL 31746742 (U.S. Dec. 10, 2002) (No. 01-800), further

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[2] The Record reveals that Petitioner failed to show that Congress intended to preclude the waiver of punitive damages from Title VII claims. *See also Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 521-22 (2000) (arbitration clause was valid where petitioner failed to support her argument that she was unable to vindicate her statutory rights in arbitration because of prohibitive costs).

clarifies that issues of "waiver" are for the arbitrator to decide in the first instance, not for the court. *Howsam,* 2002 WL 31746742, *4. In *Howsam,* this Court held that an arbitrator, not the courts, must interpret the application of the six-year time limit provisions of the arbitration rules for the National Association of Securities Dealers. *Id.* at *4-5. Significantly, although the courts should determine the "question of arbitrability" about "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," the Court reasoned that questions of time limitations and "waiver" were "procedural questions" left appropriately to the arbitrator to decide in the first instance:

> At the same time the Court has found the phrase "question of arbitrability" *not* applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively *not* for the judge, but for an arbitrator, to decide. *John Wiley* [*& Sons, Inc. v. Livingston,* 376 U.S. 543, 557 (1964)] (holding that an arbitrator should decide whether the first two steps are prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide "allegation[s] of *waiver*, delay, or a *like defense to arbitrability*." *Moses H. Cone Memorial Hospital* [*v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983)].

Howsam, 2002 WL 31746742, at *3 (emphasis added). Accordingly, the Fifth Circuit in its opinion below correctly compelled arbitration of Petitioner's Title VII claim, concluding under Supreme Court precedent that "[t]he arbitrator [in the first instance] may consider the argument

that the remedy of punitive damages may not be *waived* for a Title VII claim." (*See* Pet. at A-11) (emphasis added). Petitioner thus fails to prove that a conflict exists with this Court's opinions.

II.

THE DECISION BELOW DOES NOT PRESENT A CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *PALADINO V. AVNET COMPUTER TECHNOLOGIES, INC.*

No conflict exists among the circuits regarding the arbitrability of Title VII claims where the parties have waived the availability of punitive damages in the arbitration agreement. Petitioner wrongly asserts that the Fifth Circuit's opinion in this case conflicts with the opinion of the United States Court of Appeals for the Eleventh Circuit in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998).[3] (*See* Pet. at 3). Unlike the

[3] *Paladino* is the only case that Petitioner mistakenly identifies as being in "conflict" with the Fifth Circuit Court of Appeals. On the other hand, numerous courts clearly apply the reasoning in the Fifth Circuit's case to allow the waiver of punitive damages for claims falling within the scope of an arbitration clause. *See, e.g., Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001) (allowing Racketeer Influenced Corrupt Organizations Act ("RICO") claim to proceed to arbitration despite language in arbitration clause excluding punitive damages); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 231-32 (3rd Cir. 1997) (noting that "a contractual waiver of punitive damages is not a valid ground for refusing to compel arbitration"), *cert. denied*, 522 U.S. 915 (1997); *Herrington v. Union Planters Bank, N.A.*, 113 F.Supp.2d 1026, 1032 (S.D.Miss. 2000) (class action under Truth in Savings Act was still enforceable regardless of contractual waiver of punitive damages), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) (table); *Kinnebrew v. Gulf Ins. Co.*, 1994 WL 803508 (N.D.Tex. 1994) (rejecting plaintiff's

(Continued on following page)

instant case, however, the arbitration clause in *Paladino* had the following language seemingly *excluding all* Title VII and other non-contract suits from arbitration:

> *The arbitrator is authorized to award damages for breach of contract only, and shall have no authority whatsoever to make an award of other damages.*

Id. at 1056 (court's emphasis). The *Paladino* court contrasted the language seemingly excluding entire categories of suits from arbitration with arbitration clause language that seemed to *include* Title VII and other statutory suits:

> To that end, *the Company and I consent to the settlement by arbitration of any controversy or claim arising out of or relating to my employment or the termination of my employment.*

Id. (court's emphasis). Reading the two clauses together, the court concluded that the two provisions "work[ed] hand-in-glove to make it difficult for the employee to obtain *any* [Title VII] relief" because "if an arbitrator were to award [the plaintiff] *classic Title VII relief such as back pay or reinstatement*, a court applying the FAA could *vacate* the award." *Id.* at 1061 (emphasis added). In particular, the appellate court focused on the language in the clauses limiting the arbitration award to "breach of contract only" since "Title VII actions are, of course, not contracted." *Id.* Thus, the court reasoned "[w]hen an

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argument that an arbitration policy which did not allow for punitive damages, among other damages, denied her "substantive right" to sue for sex discrimination under the Texas Commission of Human Rights Act).

arbitration clause has provisions that defeat the remedial purpose of the statute, . . . the arbitration clause is not enforceable." *Id.* at 1062.

Significantly, both the Eleventh Circuit in *Paladino* and the Fifth Circuit in the instant case engage in "questions of arbitrability." However, unlike *Paladino*, DeStefano's arbitration clause does not rule out *all* relief under Title VII so as to defeat the remedial purpose of the statute. For instance, DeStefano's arbitration clause does not "*completely proscribe*[ ] an arbitral award of Title VII damages." *Paladino*, 134 F.3d at 1060 (emphasis added). Indeed, if DeStefano proceeds with arbitration and prevails on his Title VII claim, the arbitrator may still award him significant "*classic Title VII relief*," *id.* at 1061 (emphasis added), *e.g.*, back pay or lost compensation, reinstatement, compensatory damages for emotional distress, and attorney's fees. In short, both parties in this case have adequately and voluntarily given up one form of relief, punitive damages, but they have not at all given up their ability to assert a cause of action under Title VII or other statutes.[4] Thus, the *Paladino* opinion does not at all conflict with the Fifth Circuit's decision in the instant case.

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[4] Broadwing's counterclaims against DeStefano also seek "exemplary" damages for DeStefano's actions, including DeStefano's creation of a hostile work environment which caused Broadwing significant expense. (R 64). Naturally, exemplary damages for these claims by Broadwing would be similarly excluded in arbitration proceedings.

III.

A WRIT OF CERTIORARI IS NOT WARRANTED MERELY BECAUSE THIS CASE INVOLVES THE ARBITRATION OF EMPLOYMENT DISPUTES

Although this case arises out of the employment context, this Court has no compelling reason at this time to review the Fifth Circuit's decision compelling the arbitration of Petitioner's Title VII claim. Petitioner wrongly argues that review is compelled because "countless employees whose substantive rights written into the Civil Rights Act of 1991 by Congress are threatened by mandatory arbitration agreements excluding punitive damages from the remedies available to the arbitrator entered into as a requirement of their employment in defiance of the mandate of Congress." (Pet. at 3-4). However, not only has Petitioner failed to introduce anything into the Record below showing that Congress intended to preclude the waiver of punitive damages in Title VII cases, but nothing exists to truly differentiate employment arbitration agreements from commercial ones.

Petitioner argues that the waiver of punitive damages in employment arbitration agreements compels this Court's attention, but ignores Supreme Court precedent emphasizing that courts under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are compelled to enforce employment arbitration agreements just as much as other arbitration agreements. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001) ("We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."). In fact, the Supreme Court has observed that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of

particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc.*, 532 U.S. at 123. Accordingly, lacking any compelling reason to warrant review, this Court should decline to grant Petitioner's request for writ of certiorari.

IV.

A WRIT OF CERTIORARI IS NOT WARRANTED BASED UPON THIS COURT'S DECISION TO REVIEW *PACIFICARE HEALTH SYSTEMS, INC. V. BOOK*

This Court's pending review of the Eleventh Circuit appellate court's decision in *Pacificare Health Systems, Inc. v. Book,* 285 F.3d 971 (11th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3264 (2002) (No. 02-215), does not provide a compelling reason at this time to review the Fifth Circuit's decision below. Petitioner wrongly argues that a compelling reason exists at this time to review the Fifth Circuit's opinion in this case because the *Pacificare Health Systems* case deals with a "similar issue." (Pet. at 4-5). Petitioner requests that this Court "decide this case and the *Pacificare* case as companion cases, or, at a minimum, . . . hold this petition until *Pacificare* is decided." (Pet. at 5). However, the *Pacificare* case is wholly distinguishable from the instant case and does not present a compelling reason to review the Fifth Circuit's decision.

Unlike the present case, *Pacificare Health Systems* asks whether a district court must compel the arbitration of a plaintiff's RICO claims, which allow for treble damages, when the arbitration agreement waives any claim for punitive damages. *Pacificare Health Systems, Inc.*, 285

F.3d at 973. In *Pacificare Health Systems,* the Eleventh Circuit affirmed the district court's holding that "those arbitration clauses that exclude punitive damages are unenforceable in this suit because they preclude recovery of treble damages under RICO." *Id.* at 973. The parties in the suit were subscribers and physicians who sued various health maintenance organizations (HMOs) for RICO violations, among other claims. *Id.* at 973.

DeStefano's Title VII claim, however, does not involve RICO treble damage provisions and further is an employment retaliation, not a commercial, arbitration matter. Consequently, some of the questions uniquely facing the *Pacificare* case, but not DeStefano's case, include (1) whether Congress intended to preclude any limitation of punitive damages in RICO claims, (2) whether RICO treble damages are actually "punitive" in nature, (3) whether the particular arbitration language at issue did in fact waive RICO treble damages, and (4) whether a plaintiff may obtain effective relief for his RICO claims under the language of the arbitration clause. Far from being "companion cases," all of the RICO issues are irrelevant to DeStefano's Title VII cause of action.

Moreover, Petitioner is wrong to argue that his "claim for relief in any event is more compelling than that of the Petitioner in *Pacificare* because employment contracts are generally entered into by employees as a condition of employment, and the waivers of statutory rights in commercial contracts, between commercial parties, such as in *Pacificare*, are ordinarily voluntary, resulting from negotiations." (Pet. at 5). As noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), however, the courts have long "reject[ed] the supposition that the advantages of the arbitration process somehow disappear when transferred

to the employment context." *Circuit City Stores, Inc.*, 532 U.S. at 122-23. Moreover, Petitioner's argument conveniently overlooks his own work history with Broadwing. As a well-compensated executive, Petitioner can hardly argue that the arbitration provision in his employment agreement was at all coerced. In any case, at this point, Petitioner has waived all arguments that his arbitration agreement was the result of duress, fraud, or any other ground existing in law or equity. Accordingly, there is no compelling reason for this Court to review the Fifth Circuit's decision.

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

NANCY L. PATTERSON
ANTON PAL MONTAÑO
BAKER & HOSTETLER LLP
1000 Louisiana, Suite 2000
Houston, Texas 77002-5009
(713) 751-1600 – Telephone
(713) 751-1717 – Telecopier

Counsel for Respondents
Broadwing Communications, Inc.;
Broadwing Telecommunications, Inc.

APPENDIX INDEX

		Page
9 U.S.C. § 2. –	Validity, irrevocability, and enforcement of agreements to arbitrate	App. 1
9 U.S.C. § 4. –	Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination	App. 1
42 U.S.C. § 1981a. –	Damages in cases of intentional discrimination in employment	App. 2

APPENDIX

9 U.S.C. § 2. – Validity, irrevocability, and enforcement of agreements to arbitrate. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

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9 U.S.C. § 4. – Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in

accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof

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42 U.S.C. § 1981a. – Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964

(42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(b)(5)) or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)).

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A)

in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B)

in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C)

in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D)

in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section –

(1)

any party may demand a trial by jury; and

(2)

the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means –

(A)

in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B)

in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section

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